Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 2001

ERIC SMITH,
Petitioner,

v.

JOE WILLIAMS, Warden,
Respondent.

ON WRIT OF CERTIORARI TO
THE SEVENTH JUDICIAL DISTRICT COURT
FOR THE STATE OF NEW MEXICO

PETITION FOR WRIT OF CERTIORARI

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42 P

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QUESTIONS PRESENTED

1. Whether due process requires a State post-conviction court to conduct an evidentiary hearing regarding claimed federal constitutional violations when a petitioner's post-conviction petition contains allegations, which if proven, would entitle petitioner to relief for violation of his federal constitutional rights?

2. Whether due process requires a State post-conviction court to conduct an evidentiary hearing regarding claimed federal constitutional violations when the alleged violations could not be raised on appeal and are being raised for the first time in a post-conviction proceeding?

PARTIES TO THE PROCEEDINGS BELOW

The parties below, in addition to the petitioner, were the State of New Mexico, represented by Arthur Pepin, Assistant Attorney General, Post Office Drawer 1508, Santa Fe, New Mexico 87504, and Gloria McCrary, Deputy District Attorney, Seventh Judicial District, Post Office Box 1099, Socorro, New Mexico 87801.

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I. DUE PROCESS REQUIRES A STATE POST-CONVICTION COURT TO CONDUCT AN EVIDENTIARY HEARING REGARDING CLAIMED FEDERAL CONSTITUTIONAL VIOLATIONS WHEN A PETITIONER'S POST-CONVICTION PETITION CONTAINS ALLEGATIONS, WHICH IF PROVEN, WOULD ENTITLE PETITIONER TO RELIEF FOR VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS

A. Due Process in State Post-Conviction Proceedings. 17

i. Due Process, as guaranteed by the Fourteenth Amendment, applies to all state post-conviction proceedings where a petitioner is litigating claimed violations of his federal constitutional rights. 17

ii. Even if the Due Process Clause of the Fourteenth Amendment does not apply to all state post-conviction proceedings, it applies to state post-conviction proceedings that raise alleged violations of federal constitutional rights when those alleged violations could not be raised on appeal and are being raised for the first time in a post-conviction proceeding. 20

B. The application of the Due Process Clause in this case. 22

i. Eric Smith was denied due process of law in his state habeas corpus proceeding regarding federal constitutional claims of ineffective assistance of counsel when the New Mexico District Court for the Seventh Judicial District failed to hold an evidentiary hearing wherein Mr. Smith would have been given the opportunity to prove his claims that he was entitled to relief pursuant to

Strickland v. Washington, 466 U.S. 558 (1984) and Evitts v. Lucey, 469 U.S. 387 (1985). 22

a. Eric Smith's state habeas corpus petition contained allegations that if proven entitled him to relief for violations of his federal constitutional right to the effective assistance of counsel at trial and on appeal. 22

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PETITION FOR WRIT OF CERTIORARI TO THE SECOND JUDICIAL DISTRICT COURT OF NEW MEXICO

OPINIONS BELOW

The judgment to be reviewed is that of the Seventh Judicial District Court for the State of New Mexico, dated November 30, 2001. A petition to the New Mexico Supreme Court for writ of certiorari to the Seventh Judicial District Court of the State of New Mexico was denied on January 29, 2002.

JURISDICTION

Jurisdiction was conferred on this Court by Rule 10b and 10c of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." **U.S. Const. amend. VI**

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." **U.S. Const. amend. XIV, Section 1**

STATEMENT OF THE CASE

Eric Smith was originally convicted in **State v. Mr. Smith**, CR 94-009, Hon. Edmund H. Kase III, Seventh Judicial District Court, Socorro, New Mexico on December 15, 1994, pursuant to a jury verdict of first degree murder, false imprisonment, assault with intent to commit a felony, conspiracy, tampering with evidence and contributing to the delinquency of a minor. A direct appeal was taken to the New Mexico Supreme Court in **State v. Mr. Smith**, No. 22,981, and on May 15, 1997, the court affirmed on all

issues but remanded the case for re-sentencing on the aggravated assault charge. A copy of that case is attached in the Addendum at p. 22. On July 11, 1997, an amended judgment, sentence and commitment was filed. A copy of that judgment is attached in the Addendum at p. 57.

Mr. Smith then sought relief pursuant to a petition for writ of habeas corpus in accordance with Rule 5-802 of the New Mexico Rules of Criminal Procedure. On May 14, 1999, Mr. Smith, through his then attorney, filed the original Petition for Writ of Habeas Corpus with the District Court raising various claims regarding the ineffective assistance of his trial counsel. A copy of the Petition for Writ of Habeas Corpus, filed May 14, 1999, is attached in the Addendum at p. 17. The petition had several exhibits attached to it, including a copy of the Supreme Court decision regarding Mr. Smith's appeal. On June 10, 1999, a Response was filed by the District Attorney's Office for the Seventh Judicial District. A copy of the Response is attached in the Addendum at p. 34.

On July 31, 2001, Mr. Smith, with new counsel, filed an Unopposed Motion for Leave to file an Amended Petition for Writ of Habeas Corpus. The motion was granted. The Amended Petition for Writ of Habeas Corpus was also filed on July 31, 2001. A copy of the Amended Petition is attached in the Addendum at p. 37.

The Amended Petition contained seven claims regarding the ineffective assistance of his trial counsel and one claim regarding the ineffective assistance of his appellate counsel The claims were alleged to be in violation of the constitutions and laws of the United States and the State of New Mexico, specifically the Sixth and Fourteenth

Amendments to the United States Constitution and Art. II, Section 14, of the New Mexico Constitution.

Mr. Mr. Smith based his claims on the assertion that his attorneys did not provide him the constitutional right to a fair trial and the effective assistance of counsel during his trial and during his appeal to the New Mexico Supreme Court. Specifically, Mr. Mr. Smith's claims were:

(a) Mr. Mr. Smith was denied his rights to a fair trial and the effective assistance of counsel at trial when his trial attorney failed to object on hearsay grounds and constitutional grounds (the right to confrontation) regarding the introduction of highly prejudicial hearsay testimony;

(b) Mr. Mr. Smith was denied his rights to a fair trial and the effective assistance of counsel at trial when his trial attorney failed to object to the District Attorney's actions of calling a witness to the stand to determine if the witness would invoke her right to remain silent in front of the jury and when the District Attorney continued to ask questions when the witness did exercise her right to remain silent and refused to answer questions asked by the District Attorney;

(c) Mr. Mr. Smith was denied his rights to a fair trial and the effective assistance of counsel at trial when his trial attorney failed to object to the display before the jury of numerous weapons,

rifle shells, bullet shells, etc. when those items were being marked as potential exhibits by the District Attorney. Those items were not relevant, highly prejudicial and were subsequently ruled inadmissible by the trial judge;

(d) Mr. Mr. Smith was denied his rights to a fair trial and the effective assistance of counsel at trial when his trial attorney failed to utilize an additional polygraph expert after he had solicited and received funds for the specific purpose of hiring that additional expert after receiving notice from the District Attorney that they would be challenging the methods used and results obtained from Mr. Mr. Smith's polygraph expert;

(e) Mr. Mr. Smith was denied his rights to a fair trial and the effective assistance of counsel at trial when his trial attorney failed to call a critical witness at trial who could have testified regarding numerous inconsistent statements made by a witness for the prosecution, Brian Jones, even though trial counsel knew about these inconsistent statements well in advance of trial and the critical witness was available at trial;

(f) Mr. Mr. Smith was denied his rights to a fair trial and the effective assistance of counsel when his trial counsel failed to impeach a critical witness for the prosecution, Brian Jones, even though

he had evidence that Mr. Jones had made numerous prior inconsistent statements that cast doubt on his trial testimony;

(g) Mr. Mr. Smith was denied his rights to a fair trial and the effective assistance of counsel when his trial attorney caused and allowed a complete breakdown in the adversarial relationship during the questioning of a critical witness who exercised his Fifth Amendment privilege against self-incrimination and refused to testify when he was asked by the District Attorney if he had previously made numerous highly prejudicial statements regarding his participation in the crime Mr. Mr. Smith was being tried for and Mr. Mr. Smith's alleged participation in the crime; and,

(h) Mr. Mr. Smith was denied the right to the effective assistance of counsel on appeal when his appellate attorney failed to raise the issues listed in paragraphs a, c and g above in the appellate brief submitted by appellate counsel to the New Mexico Supreme Court. Reasonably competent counsel would have submitted these issues on appeal and there is a reasonable probability that the conviction of Mr. Mr. Smith would have been reversed by the New Mexico Supreme Court had those issues been submitted.

Mr. Smith included a statement of facts in his habeas petition that he alleged supported his habeas corpus claims. Those facts are as follows: Eric Smith, Darcy Morrison and Mark Apodaca were arrested for allegedly murdering Adam Price. Mark Apodaca entered into a plea agreement with the state, which allowed him to plead guilty to second-degree murder and conspiracy. The agreement required Mark Apodaca to give a sworn deposition that all three defendants had shot Adam Price. Mark also was required to take and pass a polygraph examination and testify against Darcy and Eric. Mark Apodaca attended the deposition and submitted to the polygraph examination. The polygraph examination revealed that he was deceptive regarding several relevant questions as to who actually shot Adam Price. As a result, the state withdrew the plea agreement.

At the time of the trial for Eric Smith, both Mark Apodaca and Darcy Morrison were awaiting resolution of their charges. The state called Darcy to the stand because the District Attorney wanted to see if she was going to invoke her Fifth Amendment privilege. The state also wanted to establish a foundation that she was unavailable as a witness so that the state could get a critical witness's (Jennifer Jones') hearsay testimony admitted as a statement against Darcy's penal interest.[1] When Darcy Morrison was

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[1] Both Jennifer Jones and her husband Brian Jones were allowed to testify to numerous prejudicial hearsay statements made by Darcy Morrison and Mark Apodaca. Mr. Smith's trial counsel failed to object on either hearsay or the right to confrontation grounds. Although the District Attorney told both the court and Mr. Smith's trial attorney that they were calling Darcy Morrison to demonstrate that she was unavailable and therefore the hearsay testimony would become admissible, that is not the law in New Mexico. In addition to the establishing the unavailability of the witness, the Defense Attorney would have had to meet the second

called to the stand as a witness, she did invoke her Fifth Amendment privilege in front of the jury.

The District Attorney asked Darcy several questions in front of the jury and each time she invoked her Fifth Amendment privilege. Darcy Morrison was asked whether she was present when Adam Price was killed. She was also asked, "Isn't it true that Eric Smith shot and killed Adam Price?" She was also asked whether between the killing and her arrest, whether she had "numerous conversations with Brian Jones as to the killing of Adam Price?" Finally, she was asked whether she also had "numerous conversations with Jennifer Jones where you admitted that you were a participant in the killing of Adam Price?" Mr. Smith's trial attorney, Javier Acosta, did not object to the calling of Darcy Morrison to the stand in front of the jury and did not object to the District Attorney asking repeated questions with Darcy Morrison invoking her Fifth Amendment privilege each time. Mr. Mr. Smith's trial attorney also failed to seek any limiting instructions regarding both the questions asked of Darcy Morrison and the fact that she had invoked her Fifth Amendment privilege. Mr. Mr. Smith's trial attorney also failed to request that Darcy Morrison be questioned outside the presence of the jury.

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prong of the hearsay rule—show that the statements were made under trustworthy circumstances. Even if the District Attorney could have established the second prong, the testimony would not have been admissible because Mr. Smith was being denied his right to confrontation because he was not allowed to question Darcy Morrison. Reasonably competent attorneys would have objected on hearsay grounds and right to confrontation grounds. Mr. Smith was prejudiced by his trial counsel's failure to object because Jennifer Jones and Brian Jones testified repeatedly to highly prejudicial statements allegedly made to them by either Darcy Morrison or Mark Apodaca.

Mark Apodaca was called as a defense witness. All parties expected Mark Apodaca to invoke his Fifth Amendment rights even though his attorney was not present when Mark Apodaca was called to the stand. The trial court advised Mark Apodaca of his Fifth Amendment rights and then told Mark Apodaca that he should invoke those rights and not answer any questions. Defense counsel asked Mark Apodaca about the statements Mark had made during his deposition and whether as a result of his deception in the polygraph examination, his plea agreement was withdrawn by the state. Mark Apodaca repeatedly invoked his Fifth Amendment privilege, in front of the jury, in response to questioning by Mr. Mr. Smith's attorney and the District Attorney.

The primary purpose of calling Mark Apodaca to the witness stand was to demonstrate that Mark Apodaca had been deceptive regarding his statements made at the deposition. Although the trial court allowed Mr. Mr. Smith's attorney to question Mark Apodaca regarding the deposition, it subsequently instructed the jury to disregard the testimony "regarding purported polygraph results, as those questions pertain to conduct and actions of the defendant in this case, Mr. Smith, and the other defendant, Darcy Smith. That testimony is to be stricken from your consideration in arriving at a verdict in this case." During the cross-examination of Mark Apodaca, the District Attorney read repeatedly from the deposition testimony and then noted for the record that the witness, Mark Apodaca, did not give a response. Those leading questions include repeated references regarding allegations that Eric tried to shoot Adam in the head but missed and hit his upper body; that Adam did not have a gun; that Darcy shot Adam twice, etc. The entire questioning of Mark Apodaca, by the District

Attorney and Eric Smith's trial attorney, resulted in a complete breakdown of the adversarial relationship that is part of our justice system.[2]

During the trial, the District Attorney began marking various exhibits that he planned to introduce as evidence. That evidence included a rifle, bullets, shotgun shells, and other highly prejudicial evidence[3] that had been seized from Smith's home. Those items were paraded before the jury, still sitting in the jury box, until the trial court at a later point realized that perhaps the jury should be sent to the jury room. Subsequently, the trial court ruled that many of these items were not relevant to the case and ruled that they would not be admissible. However, the District Attorney had paraded many of these items before the jury and all of the items had been on display on a table in the courtroom. Mr. Mr. Smith's trial attorney never sensed the importance of the jury viewing all this highly prejudicial non-relevant evidence that depicted Mr. Mr. Smith as a violent person who possessed numerous weapons and bullets, etc. Mr. Mr. Smith's trial attorney never objected to the District Attorney's display of

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[2] The issue regarding the calling of Darcy Morrison and Mark Apodaca and their invoking their Fifth Amendment privileges before the jury was raised on appeal. The New Mexico Supreme Court held that the issue was waived because trial counsel had failed to object at trial.

[3] The rifle and many of the bullets, shells, etc. were not even the same type or caliber as those allegedly used during the murder of Adam Price. Ironically, the District Attorney also attempted to have marked as evidence some records indicating that Eric Smith had purchased ammunition for a gun. Unbeknownst to either the District Attorney or Mr. Smith's trial attorney, the records indicated that the ammunition was purchased after the death of Adam Price. Fortunately, the trial court inspected the records and told both the District Attorney and Mr. Smith's trial attorney that the ammunition had been purchased at a later date.

these items before the jury and never asked the court to give a limiting instruction to the jury regarding those items. Reasonably competent attorneys would have objected to the parading of this evidence before the jury and would have sought a limiting instruction to diminish the prejudicial effect it had on the jury.

Eric Smith's trial attorney had been given notice prior to trial that the state intended to call a polygraph expert who would testify that Mr. Mr. Smith's polygraph expert had made mistakes in the administration of the polygraph and the interpretation of the results. Mr. Mr. Smith's trial attorney solicited funds from Mr. Mr. Smith's family to hire an additional expert to bolster his expert's testimony. He failed to call that expert at trial even though that proposed expert's testimony would have been favorable to Mr. Mr. Smith. Reasonably competent attorneys would have used this additional expert at trial. Mr. Mr. Smith was prejudiced by his trial counsel's omission in this area because the jury would have believed his expert had his testimony been bolstered by an additional expert.

Mr. Smith's trial attorney also had a witness who could testify regarding numerous inconsistent statements that Brian Jones made prior to his appearance at trial. This witness had evidence in her possession that could have been effectively used to impeach Brian Jones's so-called trial testimony. Mr. Mr. Smith's trial attorney did not call that witness or use the information she had about Brian Jones's prior inconsistent statements. This testimony was crucial, as it would have helped establish that Brian Jones was not a credible witness because he had made numerous inconsistent statements prior to appearing in court. Reasonably competent attorneys would have used this evidence at trial.

Finally, Mr. Smith's appellate counsel failed to raise numerous constitutional issues of significant magnitude on appeal. Those issues would have been raised on appeal by reasonably competent attorneys and there is a reasonably probability the New Mexico Supreme Court would have granted him relief on those issues had they been raised.

The State filed a Response on October 23, 2001. A copy of the Response is attached in the Addendum at p. 75. The State alleged in the Response that all of the issues raised in the Amended Petition were matters that could reasonably be related to strategy and should not be second-guessed. The State requested that the Amended Petition be summarily dismissed as a matter of law and that Mr. Smith had "failed to raise any valid reason for the District Court to grant Petitioner's request for a Habeas Corpus Hearing."

Counsel for Mr. Mr. Smith filed a Reply to the Response on November 14, 2001. A copy of the Reply is attached in the Addendum at p. 80. Mr. Smith argued in the Reply that the State's position was erroneous because both New Mexico and federal case law do not support the position that any and all actions or inactions of trial and appellate counsel are protected from habeas corpus review if those actions or inactions can reasonably be attributed to trial or appellate counsel's strategic decisions. Mr. Smith pointed out in the Reply that the State's position was wrong because of two basic reasons. First, the State did not offer, and the record did not contain, any evidence or facts to support the position that trial and appellate counsel's errors or omissions were part of any strategy. Second, any such strategy would have had to been a strategy that reasonably competent attorneys would have made. Mr. Smith pointed out that the only facts in the record of this Habeas Corpus case were those presented in Mr. Smith's Amended Petition. The State

had not presented any facts to support the defenses raised in the Response. Mr. Smith further pointed out in the Reply that an evidentiary hearing was necessary in this case so that the factual basis for this case could be established. Mr. Smith specifically requested an evidentiary hearing so that he could prove the facts alleged in the petition and the Court could hear evidence from an expert, or experts, regarding how reasonably competent attorneys would have performed in the representation of Mr. Smith.

On November 30, 2001, the Hon. Edmund Kase III issued an Order summarily denying the Petition for Writ of Habeas Corpus based on the arguments and authorities contained in the State's Response. Judge Kase also stated in the Order that an evidentiary hearing was not required. A copy of the Order is attached in the Appendix at p. 1.

On January 2, 2002, Mr. Smith filed a Petition for Writ of Certiorari with the New Mexico Supreme Court alleging that his petition for writ of habeas corpus contained sufficient facts to withstand summary dismissal and that the Seventh Judicial District Court should have conducted an evidentiary hearing so that he could prove that he did not receive his constitutional guarantees to the effective assistance of counsel. Mr. Smith also raised a claim that the Seventh Judicial District Court had granted the Respondent an irrebuttable presumption that his trial and appellate attorneys had provided the effective assistance of counsel required under **Strickland v. Washington**, 466 U.S. 668 (1984). A copy of the Petition for Writ of Certiorari is attached in the Addendum at p. 4.

On January 11, 2002, the New Mexico Supreme Court ordered the Respondent to file a Response to the

Petition for Writ of Certiorari. A copy of that Order is attached in the Addendum at p. 3.

On January 25, 2002, the Respondent filed a Response alleging that Mr. Mr. Smith had failed to establish any ground to reverse the habeas court's denial of the habeas petition.[4] A copy of that Response is attached in the Addendum at p. 88.

On January 29, 2002, the New Mexico Supreme Court denied the Petition for Writ of Certiorari. A copy of that Order is attached in the Appendix at p. 3.

This Petition for Writ of Certiorari will be timely filed if mailed to the Court by United States Mail no later than April 29, 2002. See Rules 13.1 and 29.2, Supreme Court Rules.

SUMMARY OF ARGUMENT

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[4] The Respondent did not offer any citations to any record, affidavits, transcripts, or tape-recorded trial testimony to support the repeated references to alleged facts in his Response. Instead, he used his "personal review" of the entire record to describe the alleged facts that seemingly supported the Respondent's position. Mr. Smith did not have the opportunity to show that the alleged facts used by the Respondent were sometimes untrue and/or misstated. The Respondent also argued alleged facts regarding the strategy that trial and/or appellate attorneys in this case may have used in the representation of Mr. Smith. Mr. Smith did not have the opportunity to question those attorneys as to why they did or did not do certain things in his trial or on his appeal because no evidentiary hearing was held. Thus, the reasons why Mr. Smith's trial or appellate attorneys acted the way they did remains a mystery.

Mr. Smith alleges that he was denied due process of law in that he was never given the opportunity in a post-conviction procedure to present evidence that supported his claims that he had been denied a fair trial and the effective assistance of counsel that is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. His allegations are based on the theory that due process requires that a state provide a full, fair and adequate post-conviction procedure for litigants to present and prove their claims regarding violations of federal constitutional rights. Mr. Smith also alleges that even if due process does not apply to all post-conviction procedures, it certainly applies to claims that cannot be raised for the first time on appeal, but rather must be brought in a collateral proceeding wherein a litigant can offer evidence to support his claims.

This case also involves the question of whether Mr. Smith was denied due process when the New Mexico District Court created an irrebutable presumption that any decision by an attorney in a criminal case meets the dictates of **Strickland v. Washington**, 466 U.S. 558 (1984), as long as the attorneys' acts or actions can be attributed to some possible strategy. New Mexico has a post-conviction (habeas corpus) procedure that allows the presentation of claims involving the denial of federal constitutional rights. However, that procedure, as applied in his case, was insufficient to satisfy the due process requirements mandated by the United States Constitution. Mr. Mr. Smith presented a well-drafted habeas corpus petition to the Seventh Judicial District Court. The petition, on its' face, contained allegations which if proven would have entitled Mr. Mr. Smith to relief pursuant to well-established federal law. Rather than give Mr. Mr. Smith the opportunity to prove his case at an evidentiary hearing, the Seventh Judicial District Court summarily dismissed the petition based on the

Respondent's argument that any claimed attorney acts or actions that could be attributed to some possible strategy was beyond the scope of review in a habeas corpus proceeding. That standard violated the dictates of well-established federal law. There was no evidence that the claimed errors were part of any attorneys' theory or strategy. Second, Mr. Mr. Smith had claimed that no reasonable attorney would have adopted any such theory or strategy.

Finally, Mr. Mr. Smith claims he was denied due process in his state habeas corpus proceeding regarding federal constitutional claims of ineffective assistance of counsel when the New Mexico District Court for the Seventh Judicial District failed to hold an evidentiary hearing wherein Mr. Smith would have been given the opportunity to prove his claims that he was entitled to relief pursuant to **Strickland v. Washington**, 466 U.S. 558 (1984). Ineffective assistance of counsel claims, whether pertaining to trial attorneys or appellate attorneys, are best resolved by, and in some cases can only be resolved by, an evidentiary hearing. Mr. Mr. Smith repeatedly requested an evidentiary hearing so that he could prove his claims. The record in this case is completely devoid of any testimony or evidence indicating why the trial attorney acted the way he did or didn't act the way he should have during the trial. The same is true for appellate counsel. There is also no evidence in the record to indicate what reasonably competent attorneys would have done at trial or on appeal. The Seventh Judicial District Court refused to hold an evidentiary hearing wherein the facts regarding Mr. Mr. Smith's attorneys' errors or omissions could have been explored and Mr. Mr. Smith could have proven his case. In refusing to hold an evidentiary hearing, the court denied Mr. Mr. Smith due process of law in that he was denied a full, fair and adequate

procedure for bringing federal constitutional claims before the state court.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

I. DUE PROCESS REQUIRES A STATE POST-CONVICTION COURT TO CONDUCT AN EVIDENTIARY HEARING REGARDING CLAIMED FEDERAL CONSTITUTIONAL VIOLATIONS WHEN A PETITIONER'S POST-CONVICTION PETITION CONTAINS ALLEGATIONS, WHICH IF PROVEN, WOULD ENTITLE PETITIONER TO RELIEF FOR VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS

A. Due Process in State Post-Conviction Proceedings.

i. Due Process as guaranteed by the Fourteenth Amendment applies to all state post-conviction proceedings where a petitioner is litigating claimed violations of his federal constitutional rights.

Although the "scope of the state's obligation to provide collateral review is shrouded in . . . uncertainty", **Kyles v. Whitley,** 498 U.S. 931, 932 (1990) (Stevens, J., concurring in denial of application for stay), there are strong arguments as to why the United States Constitution mandates full, fair, and adequate post-conviction procedures. **Case v.**

Nebraska, 381 U.S. 336, 340-47 & nn. 5-6 (1965) (Brennan, J., concurring); **id.** At 337-40 (Clark, J. concurring). Our system of jurisprudence gives the state courts initial and primary responsibility for enforcing federal constitutional rights in the course of operating and administering each state's criminal justice system. It is the solemn duty of state courts, no less than federal courts, "to safeguard personal liberties and consider federal claims in accord with federal law." **Schneckloth v. Bustamonte,** 412 U.S. 218, 259 (1973) (Powell, J., concurring). **See Mooney v. Holohan,** 294 U.S. 103, 113 (1935) ("Upon the state courts [meaning, in the context of the case, state post-conviction courts], equally with the courts of the Union, rests the obligation to guard and embrace every rights secured by th(e) Constitution." In order for state post-conviction procedures to be full, fair, and adequate, it should provide for full fact hearings to resolve dispute factual issues. **Id.**

This Court has previously been presented with the question whether Due Process requires a state to provide a post-conviction remedy that offers an adequate corrective process for the hearing of federal constitutional guarantees. In **Case v. Nebraska,** 381 U.S. 336 (1965) this Court granted certiorari to decide that issue. However, the Nebraska legislature passed a comprehensive post-conviction statute after certiorari was granted and this Court then dismissed the writ as improvidently granted. Subsequent decisions by this Court have not answered that question.

Three cases, **United States v. MacCollom,** 462 U.S.317 (1976), **Pennsylvania v. Finley,** 481 U.S. 551 (1987), and **Murray v. Giarratano,** 492 U.S. 1 (1989), have indicated that the amount of due process, if any, required in post-conviction proceedings may be limited, those cases have not definitively resolved the question. None of those

three cases presented the question whether there is a constitutional right to post-conviction review of some sort and any statements that the Due Process Clause is not applicable to state post-conviction procedures are *dicta*.[5] Furthermore, only a minority of Justices joined the opinions in **MacCollom** and **Giarratano.** Both of those cases are plurality decisions. In addition, the sole support for the *dictum* in **Finley** was *dictum* found in **MacCollom** that indicated the unexplained view that the Suspension Clause alone, and never the Due Process Clause, controls the constitutional treatment of habeas corpus. Those three opinions' unnecessary, unsupported, and incomplete assertions—in the process of deciding cases that did not present the question and in which counsel did not address it—thus cannot be said to have resolved the question of whether the Due Process Clause is applicable to state post-conviction proceedings.

Correspondingly, this Court has indicated that the Due Process Clause does sometimes determine the constitutionality of state post-conviction proceedings. **See United States ex rel. Herman v. Claudy,** 350 U.S. 116, 119

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[5] **MacCollom** presented only the constitutionality of a federal statute requiring indigent prisoners to plead a non-frivolous claim before receiving a free transcript. **MacCollom, supra,** 426 U.S. at 319. **Finley** presented only the question whether a Pennsylvania statute that provides prisoners with extensive post-conviction remedy and a right to counsel was deficient in it also requiring appointed counsel and the trial judge to undertake a complex series of actions before concluding that a post-conviction case was frivolous. **Finley, supra,** 481 U.S. 554-55. **Giarratano** presented only the question whether Virginia's provision of counsel through a prisoners' legal services office to death row inmates seeking state post-conviction review satisfied the Constitution. **Giarranto, supra,** 492 U.S. at 3-4.

(1956) (suggesting cognizability of claimed "denial of . . . constitutional protections . . . in a [state post-conviction proceeding"); **Young v. Ragen**, 337 U.S. 235, 239 (1949); **Foster v. Illinois,** 329 U.S. 332 U.S. 134 138 (1947) (State's withholding of judicial remedy for constitutional violations occurring at criminal trials that are provable only by extra-record evidence supports "new claim of denial of due process for want of such relief"); **Carter v. Illinois**, 329 U.S. 173, 174 (1946) ("A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface."); **Woods v. Nierstheimer**, 328 U.S. 211, 217 (1946) (granting certiorari to decide whether state court's summary dismissals deprived petitioner of adequate post-conviction remedy; writ dismissed later after Court determined that other state remedies remained).

This case squarely presents this Court with the opportunity to decide whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution is applicable to all state post-conviction proceedings.

ii. Even if the Due Process Clause of the Fourteenth Amendment does not apply to all state post-conviction proceedings, it applies to state post-conviction proceedings that raise alleged violations of federal constitutional rights when those alleged violations could not be raised on appeal and are being raised for the first time in a post-conviction proceeding.

Even if the Constitution does not require that a state provide state post-conviction procedures, the Constitution does require that any—or at lest the initial—direct appellate procedure that a state provides defendants as of right must

meet minimal standards of fairness and due process. **See, e.g., Evitts v. Lucey**, 469 U.S. 387, 393 (1985); **Douglas v. California**, 372 U.S. 353, 356 (1963). The Court in **Coleman v. Thompson**, 501 U.S. 722, 755-56 (1991), indicated in *dicta* that those same constitutional norms also might apply to state post-conviction procedures whenever it is the case that state collateral review is the first place where a prisoner can present a challenge to his conviction and thus whenever a state collateral proceeding may be considered the prisoner's one and only appeal. New Mexico, like a large number of states requires that some claims, like ineffective assistance of counsel at trial or on appeal, should be hear in post-conviction proceedings because such irregularities may not surface until after direct review is complete and a record can be made as to why an attorney did or did not do certain things during trial or on appeal. For those claims, post-conviction relief necessarily serves as the prisoner's "one and only appeal" and, accordingly, should adhere to the constitutional norms of fairness and due process. This Court's decision in **Ford v. Wainwright**, 477 U.S. 399 (1986), supports that position. In **Ford**, in confronting a claim likely to arise for the first time only after direct appeal, the Court held both that the states may not constitutionally execute an individual who became insane following trial and that they must afford minimally adequate post-conviction procedures for assessing the sanity of condemned prisoners prior to their execution. **Id.** at 414-17. Likewise, in **Johnson v. Mississippi**, 486 U.S. 578, 587-88 (1988), the Court faulted Mississippi for lacking a post-conviction procedure in which a prisoner could secure relief from a death sentence that was premised in part on a prior conviction later held to be unconstitutional.

This case squarely presents this Court with the opportunity to decide whether the Due Process Clause of the

Fourteenth Amendment to the United States Constitution is applicable to all state post-conviction proceedings. If not, then this case squarely presents this Court with the opportunity to decide whether the Due Process Clause of the Fourteenth Amendment applies to state post-conviction proceedings that raise alleged violations of federal constitutional rights when those alleged violations could not be raised on appeal and are being raised for the first time in a post-conviction proceeding?

B. The application of the Due Process Clause in this case.

i. Eric Smith was denied due process of law in his state habeas corpus proceeding regarding federal constitutional claims of ineffective assistance of counsel when the New Mexico District Court for the Seventh Judicial District failed to hold an evidentiary hearing wherein Mr. Smith would have been given the opportunity to prove his claims that he was entitled to relief pursuant to Strickland v. Washington, 466 U.S. 558 (1984) and Evitts v. Lucey, 469 U.S. 387 (1985).

a. Eric Smith's state habeas corpus petition contained allegations that if proven entitled him to relief for violations of his federal constitutional right to the

effective assistance of counsel at trial and on appeal.

In order for Mr. Smith to prevail on his constitutional claims that he did not receive effective assistance of counsel, he had to initially plead and then prove that his attorneys, both at the trial level and the appellate level, did not exercise the skill of reasonably competent attorneys, and that such incompetent representation prejudiced his case, rendering the results unreliable. **Strickland v. Washington**, 466 U.S. 668, 697 (1984); **Evitts v. Lucey**, 469 U.S. 387 (1985). Mr. Smith pleaded facts in his Amended Petition that were sufficient to meet that standard regarding his claims of ineffective assistance of counsel. The State was not entitled to summary dismissal because Mr. Smith alleged claims, which if he proved at an evidentiary hearing, would have required the setting aside of his conviction and the granting of a new trial. **See State v. Bruce**, 82 N.M. 315, 481 P.2d 103 (1971) (decided under post-conviction rules that existed before the enactment of Rule 5-802). Summary dismissal and the denial of an evidentiary hearing are improper when such facts and claims are presented in a petition requesting post-conviction relief. **State v. Moser**, 78 N.M. 212, 430 P.2d 106 (1967). Likewise, in **Brooks v. Shanks**, 118 N.M. 716, 885 P.2d 637 (1994), the court held that "if a petition demonstrates [a violation] on its face, . . .the trial court must hold an evidentiary hearing to verify or discredit the petitioner's factual allegations, *unless* it plainly appears that the petitioner is not entitled to relief as a matter of law, based on (1) the facts alleged in the petition (including any attachments thereto) or (2) the uncontroverted facts shown by either the court record or the respondent's response to the petition." **Id.** 118 N.M. at 720, 885 P.2d at 641 (Emphasis in original).

In this case, the Seventh Judicial District Court did not rely on any facts outside Mr. Mr. Smith's habeas petition, but rather adopted the State's argument that all Mr. Smith's claims were claims that could reasonably be related to trial strategy. In effect, the State, without any evidentiary support, argued for, and was granted, an irrebuttable presumption that claims regarding attorney's actions, errors or omissions are not cognizable in a habeas corpus petition if they can reasonably be related to any possible trial strategy. The State misstated the law regarding habeas corpus review of claims involving ineffective assistance of counsel and the district court summarily dismissed Mr. Smith's claims based on the State's misleading argument. Litigants such as Mr. Mr. Smith need the opportunity for an evidentiary hearing where they can establish the real reasons their attorneys acted the way they did, or failed to act, and whether reasonably competent attorneys would have acted in the same manner. Mr. Smith did everything that was required to get an evidentiary hearing in this case. His petition contained claims, that if proven, were sufficient to grant him relief pursuant to **Strickland v. Washington**, 466 U.S. 668 (1984).

There was no evidence presented to the court or contained within the record of this case that demonstrated why Mr. Mr. Smith's acted the way they did at trial or during the appeal. Second, while the decisions of attorneys as to the conduct of a trial or appeal may normally be strategic decisions, the Sixth Amendment to the United States Constitution requires that those decisions must be ones that reasonably competent attorneys would make. Not every choice that might be characterized as a deliberate tactic or strategy is reasonable under **Strickland v. Washington**, 466 U.S. 668, 690-91 (1984).

Mr. Smith alleged in his petition that his trial and appellate attorneys failed to act in ways that reasonably competent attorneys would have acted in such circumstances and he was prejudiced by his attorneys' errors and omissions. Mr. Smith was prepared to offer testimony from experts to demonstrate that proposition. He was denied the right to prove his claim because the district court adopted the State's argument that, in effect, all actions, inactions, or omissions of attorneys are protected as long as they can reasonably be attributed to strategy on the part of the attorney. That is not the law in New Mexico and it is not the law in any state or federal court in this nation. **Strickland v. Washington**, 466 U.S. 668 (1984).

To fully understand the weakness of the State's argument in the court below, one simply needs to review Mr. Mr. Smith's claim contained within paragraph 4(g) on page 4 of his Amended Petition. That claim alleges that his trial attorney caused and allowed a complete breakdown in the adversarial relationship during the questioning of a critical witness at trial. The State alleges that such a complete breakdown in the adversarial relationship is not cognizable under habeas corpus if it was a strategic decision of the trial attorney. The State further argued that this "break-down in the adversarial relationship" in the instant case was "a strategic decision of trial counsel and is not to be second-guessed at this state." Response at page 2, paragraph 4. The district court adopted the State's argument in granting summary dismissal as a matter of law.

In **Strickland v. Washington**, 466 U.S. 668 (1984), the Court set the standard that a convicted person must meet to establish a claim of ineffective assistance of counsel. The Court also noted that a court "must indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance." **Id.** at 689. The Court did not establish an irrebuttable presumption. In order to overcome the presumption, litigants, such as Mr. Smith, must have the opportunity to present evidence at an evidentiary hearing. In the instant case, the district court adopted the State's argument and did not allow Mr. Smith the opportunity to overcome that strong presumption. In doing so, the court below denied Mr. Mr. Smith due process of law.

b. The Seventh Judicial District Court for the State of New Mexico should have held an evidentiary hearing wherein Mr. Smith would have been given the opportunity to prove his claims and the failure to provide that hearing denied Mr. Mr. Smith due process of law.

Appellate courts do not want to second guess an attorney's decision on appeal because there is no factual basis in the trial record that indicates why an attorney acted in the manner he did and whether reasonably competent attorneys would have acted in the same manner. Appellate courts mandate that such claims be resolved by habeas corpus so that an evidentiary hearing may be conducted wherein testimony can be heard. **State v. Stenz**, 109 N.M. 536, 787 P.2d 455 (Ct. App.), **cert. denied,** 109 N.M. 562, 787 P.2d 842 (1990). **See also Townsend v. Sain,** 372 U.S. 293 (1963) (State post-conviction remedy should provide for full fact hearings to resolve disputed factual issues, and for

compilation of a record to enable federal courts to determine the sufficiency of those hearings). This procedure allows a petitioner the opportunity to develop facts to support his claim. **Rule 5-802 NMRA 2001**. A copy of Rule 5-802 is attached in the Addendum at p. 112. This procedure also allows the court to hear expert testimony regarding whether an attorney has performed his duties within the range of reasonably competent attorneys. The petitioner is also given the opportunity to prove that he was prejudiced as a result of his attorney's deficient performance.

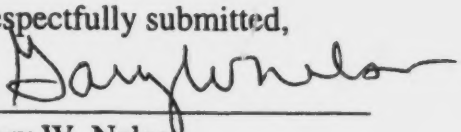
In this case, there is no evidence as to why Mr. Smith's trial counsel failed to object at trial level; why Mr. Smith's trial counsel acted the way he did at times; and why Mr. Smith's appellate counsel failed to raise certain issues on appeal? Would reasonably competent attorneys have acted the same way? Was Mr. Smith prejudiced by his attorneys' errors or omissions? The only way to answer those questions is through an evidentiary hearing where the habeas court could have heard the testimony of Mr. Smith's attorneys and the testimony of other experts regarding what reasonably competent attorneys would have done at the time. An evidentiary hearing would have answered those questions in this case. It would have also provided Mr. Smith for the first time the opportunity to prove that he was denied a fair trial and the effective assistance of counsel at trial and on appeal. The Seventh Judicial District Court denied Mr. Smith due process when it refused to allow Mr. Smith the opportunity to prove his claims in a full and fair hearing. **U.S. Const., amends. VI and XVI.**

CONCLUSION

This Court should grant this Petition for Writ of Certiorari to the Seventh Judicial District Court of the State

of New Mexico and allow the parties to fully brief the questions to assist the Court in making a decision in this case.

Respectfully submitted,

S/ 

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April 29, 2002

STATE OF NEW MEXICO

SEVENTH JUDICIAL DISTRICT COURT

COUNTY OF SOCORRO

NO. 0725-CR-94-09 (KASE)

[STAMPED FILED]

ORDER

THIS MATTER HAVING come before the Court on Petitioner's Petition for Writ of Habeas Corpus filed May 14, 1999, the Court having read and reviewed said Petition as well as the Amended Petition for Writ of Habeas Corpus filed July 31, 2001, the Petitioner's Reply to State's Response filed November 14, 2001, and all other briefs and legal memoranda submitted by the parties, and the court being sufficiently advised in the premises hereby **FINDS:**

[continued on next page]

1. That the Petition for Writ of Habeas Corpus should be denied on the basis of arguments and authorities contained in the State's Response, and that an evidentiary hearing is not required.

IT IS THEREFORE ORDERED that the Petition for Writ of Habeas corpus is hereby denied.

[Stamped Signature]

_____

EDMUND H. KASE, III
District Judge, Division I

SUBMITTED BY:

[Signature]

_____

Gloria J. McCary
Deputy District Attorney

APPROVED BY:

Approved as to
Form Only
11-28-01

_____

Gary W. Nelson
Attorney for
Petitioner

THE SUPREME COURT OF NEW MEXICO
January 29, 2002

No. 27,293

Eric Smith,

Petitioner,

Vs.

Joe Williams, Warden,

Respondent

Socorro District Court CR-94-09

ORDER

This matter coming on for consideration by the court upon Petition for Writ of Certiorari filed pursuant to Rule 12-501 of the Rules of Appellate Procedure, and the Court having considered said petition and response and being sufficiently advised, Chief Justice Patricio M. Serna, Justice Joseph F. Baca, Justice Gene E. Franchini, Justice Pamela B. Minzner, and Justice Petra Jimenez Maes concurring;

NOW THEREFORE, IT IS ORDERED that the Petition for Writ of Certiorari is **denied.**

[Continued on Next Page]

IT IS SO ORDERED.

WITNESS, The Hon. Patricio M. Serna, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 29th day of January, 2002.

[Signature]

[Seal]

Madeline Garcia,
Chief Deputy Clerk